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No. 07-143

IN THE
Supreme Court of the United States

GERARD A. BAILEY, PETITIONER

v.

PAPA JOHN'S USA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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CIVIL ACTION NO. 5:02CV-76-R

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on motion for summary judgment (Dkt. # 14) of Defendant Papa John's U.S.A., Inc. ("Papa John's"). Plaintiff Gerard A. Bailey ("Bailey") responded (Dkt. # 41), Defendant replied (Dkt. #46), and this matter is now ripe for adjudication. For the reasons that follow, the Court GRANTS the Defendant's motion.

BACKGROUND

Plaintiff Bailey filed this action in 2002, shortly after being terminated from his position as general manager of a Papa John's pizza restaurant in Oak Grove, Kentucky near the Fort Campbell military base. Bailey, an African-American, claims that his termination was a result of race-based discrimination on the part of Papa John's in violation of Title VII of the Civil Rights Act of 1964. Plaintiff also claims that he was illegally denied compensation for overtime worked as required by the Fair Labor Standards Act.

STANDARD

Summary judgment is available under Fed. R. Civ. P. 56(c) if the moving party can establish that the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is "whether the party bearing the burden of proof has presented a jury question as to each element in the case." *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of evidence. To support his position, he must present evidence on which the trier of fact could find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986)). Mere speculation will not suffice to defeat a motion for summary judgment: "[t]he mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Monette v. Electronic Data Systems Corp.*, 90 F. 3d 1173, 1177 (6th Cir. 1996).

ANALYSIS

I. Plaintiff's Claim of Racial Discrimination

Plaintiff's claim of racial discrimination under 42 U.S.C. §§ 2000(e), *et. seq.*, is governed by the standard set forth in *Mitchell v. Toledo Hosp.*, in which the Sixth Circuit Court of Appeals adopted a four-part test from the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green:*

i. Plaintiff must be a member of a protected class;
ii. Plaintiff must have been discharged;
iii. Plaintiff must have been qualified for the position at issue; and
iii. Plaintiff must have been replaced by a person outside the protected class.

Mitchell v. Toledo Hosp. 964 F2d 577 (6th Cir. 1992), citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Defendant in its reply brief concedes that Plaintiff meets the first, second and fourth criteria, but asserts that Plaintiff fails to introduce evidence sufficient to raise a genuine issue of material fact as to the third. That is, Defendant concedes that Plaintiff is a member of a protected class (i.e., he is an African-American), was subjected to adverse employment action (i.e., he was terminated), and was replaced by a person outside the protected class (i.e., a white store manager). Defendant argues, however, that Plaintiff fails on element three, in which Plaintiff is required to show that he was qualified for the position at issue.

In order to show that he was qualified for his position, Plaintiff must demonstrate that he was performing at a level that met his employer's legitimate expectations.

Ang v. Procter & Gamble Co. 932 F.2d 540, 548-49 (6th Cir. 1991) (citing *McDonald v. Union Camp Corp.* 898 F.2d 1155, 1159-60 (6th Cir. 1990)). As the court in *McDonald* said: "...the aim is not to review bad business decisions, or question the soundness of an employer's judgment." 898 F.2d 1155 at 1160. Instead, the issue is whether the employer's expectations were *legitimate* ones. Id. In other words, the court must look to see if the employee was performing "to the employer's reasonable satisfaction." *Godfredson v. Hess & Clark, Inc.* 173 F.3d 365 at 372 (6th Cir. 1999).

For Plaintiff to create a question of fact on the issue of whether or not he is "qualified" for his position, he may not simply challenge the judgment of his superiors. *McDonald*, supra, at 1160. As in *McDonald*, in this case Bailey does not challenge the assertion that his superiors, including Donna Mountcastle-Adams (Area Supervisor directly above Mr. Bailey at the time of his termination) and Ted Sterrett (District Manager directly above Ms. Mountcastle-Adams), were dissatisfied with his performance. He acknowledges that on June 26, 2000, he "was provided with a 60 day Budget Plan, to increase the stores [sic] profitability" and that he "was terminated on or about August 16, 2000, for alleged performance issues relative to the store." (Affidavit of Gerard A. Bailey, September 24, 2004, attachment #3 to Plaintiff's Response to Defendant's Motion for Summary Judgment, Dkt. #41.) These steps were taken after nearly a year and a half of problems with Mr. Bailey's performance as store manager, most of which appear to have revolved around his inability or unwillingness to control his food and labor costs in a way that satisfied his superiors.

Mr. Bailey's problems appear to have begun in early 1999, and Ms. Mountcastle-Adams addressed her concerns about this directly to Mr. Bailey and required him to attend management training meetings to learn how to meet the goals set for his store by the Papa John's corporate management. His "labor percentage" (amount of money spent on labor relative to the store's entire budget) was regularly significantly above what was prescribed by the corporate management (over 30% as opposed to between 21.5 and 22%) and his "food percentage" (similar ratio describing the amount spent on food) was also somewhat above his target (32.13% as opposed to the prescribed 30.37%). Although sales in Bailey's store were sometimes at a quite high volume, its profitability was limited by these excessive costs.

Papa John's had developed two techniques, among others, to remedy these types of problems in order to ensure profitability. The company introduced a computerized Labor Management System and it mandated the use of portion-control cups to keep labor and food costs within the manager's control. Mr. Bailey, it appears, specifically decided not to utilize these tools in spite of Ms. Mountcastle-Adams's and others' attempts to warn him that his costs were not within the company's parameters. Ms. Mountcastle-Adams, in June 2000, then drafted the "performance improvement plan" which set forth specific changes to Mr. Bailey's management practices designed to remedy the problems with food and labor costs, among other problems. The plan itself also set forth goals for the store's budget and noted that, if they were not met, Mr. Bailey would be terminated.

Mr. Bailey does not dispute these underlying facts which, taken together, indicate that he simply was not performing to his employer's reasonable satisfaction. He asserts several facts that might explain why his performance was unsatisfactory (a malfunctioning oven that caused him to waste some food; the fact of congestion at the gates to Fort Campbell that extended delivery times and thus increased labor costs) but none of these assertions, even if taken to be true, rise to the level of making the expectations set forth by Ms. Mountcastle-Adams and the other supervisors *unseasonable.* Because the expectations were not unreasonable and there is no genuine issue of material fact as to whether Mr. Bailey was meeting those expectations at the time of his termination, he cannot make out a case for wrongful termination under Title VII.

II. Plaintiff's Claim for Overtime Compensation under the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) requires employers to compensate their employees who work in excess of forty hours per week at a rate of one and one-half times that employee's regular rate of employment for the hours worked in excess of forty. 29 U.S.C. §207(a). It exempts, however, employees who are "in a bona fide executive capacity." 29 U.S.C. §213(a)(1) from this requirement. The "short test" for this exemption reads:

> *Provided.* That an employee who is compensated on a salary basis at a rate of not less than $250 per week, and whose primary duty consists of the management of the enterprise in which the

> employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. §541.1(f). So, in order to meet this test, the employee must earn the requisite amount of salary, have a primary duty of management, and regularly direct the work of two or more other employees. Although Mr. Bailey appears to meet these criteria quite easily, he argues that he is in fact *not* an exempt employee (and therefore entitled to overtime compensation). That contention rests on language from one of the statute's implementing regulations which sets forth when an employee will be deemed to be paid "on a salary basis":

> [A]n employee will be considered to be paid `on a salary basis' ...if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. §54 1.602(a). The June, 2000 performance improvement plan drafted by Ms. Mountcastle-Adams (though not signed or agreed to by Mr. Bailey) included a provision indicating that if Mr. Bailey failed to meet the goals set forth in the plan, his regular salary would be reduced by $50.00 in the future. Mr. Bailey asserts that this provision removes him from the category of an

employee who is paid "on a salary basis" for FLSA purposes and entitles him to overtime compensation for his hours worked in excess of forty hours per week. This Court finds that the language in these regulations simply cannot be stretched to cover Mr. Bailey.

In *Auer v. Robbins*, the United States Supreme Court held that a policy which "permits disciplinary or other deductions in pay as a practical matter" removed employees from the category of those paid on a salary basis. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The arrangement in the "performance improvement plan" does not, however, contemplate this kind of disciplinary deduction; rather, it provides for the possibility of a prospective reduction in future salary payments in the event of a specific performance failure. This simply is not the kind of deduction considered improper in *Auer*, which dealt with retroactive deductions which amounted to "disciplinary" actions for past conduct. Id. In Mr. Bailey's case, there was no "deduction" in the sense of the statute - a withholding of compensation *already earned*. As the court in *Ackley v. Dept. of Corrections* held: "[f]uture pay adjustments do not implicate the regulation's intent because the employee knows before he or she performs the work what their pay will be." 844 F.Supp. 680, 687 (D. Kan. 1994). Mr. Bailey, then, has no claim for overtime pay because he was paid "on a salary basis" within the meaning of the regulations and thus was an exempt employee.

CONCLUSION

For the reasons outlined above, this Court concludes that Defendant is entitled to summary judgment as a matter of law on both the claim for wrongful

termination and the claim for overtime compensation. Defendant's motion for summary judgment is GRANTED and this case is DISMISSED.

An appropriate order shall issue.
Thomas B. Russell, Judge
United States District Court

CIVIL ACTION NO. 5:02CV-76-R
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

ORDER

Upon Defendant Papa John's U.S.A., Inc.'S (Papa John's) Motion for Attorney Fees (Dkt. # 52), Plaintiff's responses (Dkt. # 55, 56, 59 and 61), and Defendant's replies (Dkt. # 57, 58, and 62), and the court being otherwise sufficiently advised,
IT IS ORDERED:

Defendants shall recover attorneys' fees and costs to be calculated in accordance with the rulings set forth in the accompanying memorandum opinion.

June 14, 2005

Thomas B. Russell, Judge
United States District Court

4/11/2007

CIVIL ACTION NO. 5:02CV-76-R
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

JUDGMENT

Pursuant to the Court's Order of June 14, 2005 (Docket No. 64),
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered
as follows:

1. Papa Johns U.S.A., Inc. is awarded the sum total of $8,800.00.
2. This judgment may be enforced according to law.

Thomas B. Russell, Judge
United States District Court